# EXPLANATION OF THE JUDICIAL OPINIONS

## PUBLISHER'S NOTE

*The judicial opinions referred to in this text are official U.S. documents published under the following URLs:*

*1) 262 F.3d 1034 (9th Cir. 2001)*
a) http://bulk.resource.org/courts.gov/c/F3/262/262.F3d.1034.99-16531.html
b) http://caselaw.findlaw.com/data2/circs/9th/9916531op.pdf
*2) 239 F.3d 1108 (9th Cir. 2001)*
http://bulk.resource.org/courts.gov/c/F3/239/239.F3d.1108.99-16531.html

Under American law, property seized without a valid search warrant cannot be used as evidence at the trial of the person from whom the property is seized. In searching my cabin in 1996, the United States Government relied in bad faith on a warrant issued without what is called "probable cause." Quin Denvir and Judy Clarke, the lawyers appointed to represent me at my trial, told me that if my case had been an ordinary one the courts would probably have declared the warrant invalid. In that event, all the evidence seized from my cabin would have been excluded from my trial, and I could not have been convicted. I would have been a free man. But, said Denvir and Clarke, because of the political implications of my case it would be very difficult to persuade the courts to declare the warrant invalid.

After hearings that preceded my trial by several months, Judge Burrell, of the United States District Court for the Eastern District of California, refused to declare the search warrant invalid or exclude the evidence seized

from my cabin. That was not the end of the matter, however, for if I had been tried and convicted I could have appealed to the United States Court of Appeals for the Ninth Circuit. My lawyers, Denvir and Clarke, estimated that there was something like a twenty-percent chance that the Court of Appeals would declare the warrant invalid, in which case I would go free. Denvir and Clarke, however, were not very interested in securing my freedom. They would have preferred to negotiate a "plea agreement" with the government; that is, an agreement that I would plead guilty on condition that the government should drop its demand for the death penalty. Because the government refused to accept any plea agreement that would allow me to appeal to the Ninth Circuit, a plea agreement would have eliminated my last chance of avoiding life imprisonment, even though it would have saved me from the death penalty. I was not interested in escaping the death penalty if the alternative were life in prison. My objective was to appeal to the Ninth Circuit in an effort to have the search warrant declared invalid.

Meanwhile, my lawyers Denvir and Clarke were preparing a defense that would have portrayed me as insane. Such a defense might have saved me from the death penalty but could not have saved me from spending the rest of my life in prison or in an insane asylum. I knew that my lawyers wanted to use a defense of that type, but until shortly before the trial they dishonestly led me to believe that they could not or would not use a defense based on a claim of insanity unless I consented to such a defense. When I learned that my lawyers could use such a defense without my consent and intended to do so, there followed a series of angry disagreements between my lawyers and me. To make a long story short, I asked Judge Burrell to let me dismiss Denvir and Clarke and be represented instead by J. Tony Serra, a lawyer who had agreed not to use a mental-illness defense. When Judge Burrell denied that request, I asked permission to dispense with representation by a lawyer and represent myself before the court. The Judge denied that request too, so I was left with only two alternatives: I could either undergo a trial in which my lawyers would portray me as insane, or I could accept a plea agreement, thus sacrificing my chance to appeal to the Ninth Circuit.

In order to persuade me to accept the plea agreement, Denvir and Clarke told me that even with a plea agreement I could challenge my conviction by way of what is called a "collateral action": Under a statute labeled 28 United States Code, §2255, I could file a motion in which I would contend that my guilty plea was involuntary. Denvir and Clarke said that if I filed such a motion my chances of eventually having the search warrant declared invalid would be almost as good as they would have been with a direct appeal. Denvir and Clarke also promised to find lawyers to file a motion for me under 28 U.S.C. §2255. Several months later, other lawyers told me that in reality my chances of succeeding with a §2255 motion were very slight. Moreover, Denvir and Clarke broke their promise to find lawyers to file a §2255 motion for me; in the end I had to file the §2255 motion and litigate the entire action myself without the help of a lawyer.

The United States Constitution, as interpreted by the Supreme Court, guarantees to every defendant in a criminal trial the right to dispense with an attorney and represent himself before the court. There are, however, certain reservations; for example, a court is not required to allow a defendant to represent himself if he has requested self-representation for the purpose of delaying the trial. Judge Burrell had justified his denial of my self-representation request by claiming that I had made that request for the purpose of delay.

My §2255 motion therefore was based primarily on the contention that there was no evidence that I had intended to delay the trial, that I therefore had been improperly deprived of my constitutional right to self-representation, and that this rendered my guilty plea involuntary in the constitutional sense. Legally my argument was air-tight except at one point: In claiming that my motive for requesting self-representation was to delay the trial, Judge Burrell was making an assertion about what I was thinking at the time I made the request, and an assertion about what a person is thinking at a given time almost never can be proved or disproved conclusively. Thus, if a judge wants to decide that a defendant's motive is to delay his trial, no one can force the judge to do otherwise, however implausible his decision may seem to an objective observer.

As the first step in challenging my conviction I was required to submit my §2255 motion to Judge Burrell himself. Needless to say, he denied the motion. The next step was to take the §2255 motion to the Court of Appeals for the Ninth Circuit. An appeal to a United States Court of Appeals

ordinarily is heard by a panel of three randomly-selected judges; my appeal was heard by Judges Brunetti, Reinhardt, and Rymer. Brunetti and Rymer voted to deny my appeal. In an opinion written by Judge Rymer, they claimed to agree with Judge Burrell's conclusion that I had requested self-representation for the purpose of delaying the trial.

Judge Reinhardt disagreed with Brunetti and Rymer and wrote a dissenting opinion in which he explained that there was *no* evidence that I had intended to delay the trial. I do not appreciate Judge Reinhardt's insulting comments about me and my "twisted theories," but Reinhardt is a thoroughly conscientious and widely respected jurist of unquestioned integrity, and in his dissenting opinion he did a fine job of explicating the dispute between my lawyers, me, and Judge Burrell. However, I do have to correct Judge Reinhardt on one point: Reinhardt was mistaken in assuming that if my appeal of my §2255 motion had been successful and I had won a new trial in which I would represent myself, I would then have used the trial as an opportunity to expound my "twisted theories." Actually, if I had represented myself in a new trial I probably would have said little or nothing in court. I would have gone through the trial only so that, after being convicted, I could appeal to the Ninth Circuit on the issue of the validity of the search warrant.

After my appeal of my §2255 motion was denied by Judges Brunetti and Rymer I petitioned for a rehearing by the same three-judge panel, and simultaneously for a rehearing en banc. (When the Ninth Circuit hears a case "en banc," the case is decided by a panel of eleven judges.) Judge Reinhardt voted for a rehearing by the original three-judge panel but Brunetti and Rymer voted to the contrary, therefore there was no rehearing by the original panel. The petition for rehearing en banc was voted upon by all of the active judges of the Ninth Circuit and was denied. Reinhardt, interestingly, was one of those who voted against en banc rehearing.

When the decision to deny the petition for rehearing was published, Judge Kozinski issued a dissenting opinion in which he suggested that Judge Burrell's action in my case might have been an episode from George Orwell's novel *1984*.

In case the foregoing account leaves the reader with any doubt about my sanity, I mention the following: For about four years beginning on May 5, 1998, the date on which I first arrived at the prison where I am now held, I was visited almost every day by one or both of the two prison psychologists,

Dr. James Watterson and Dr. Michael Morrison. Drs. Watterson and Morrison did not believe these visits were necessary, but their superiors in the Bureau of Prisons had ordered them to visit me every day. In the course of four years we got to know each other rather well, and Drs. Watterson and Morrison told me repeatedly that they saw no indication that I suffered from any serious mental illness. Dr. Morrison said that the diagnosis of paranoid schizophrenia (offered by the psychologists and psychiatrists whom Denvir and Clarke had hired for that purpose) was "ridiculous" and "wildly improbable"; and on more than one occasion Morrison made caustic remarks about psychologists and psychiatrists who, he said, would provide any desired diagnosis if they were well paid for doing so.

TJK, May 4, 2007